

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN PINO : CIVIL ACTION
 :
 v. :
 :
 THOMAS M. BAUMEISTER, DETECTIVE :
 LOWER MERION POLICE DEPARTMENT : NO. 96-5233

MEMORANDUM ORDER

In this 42 U.S.C. § 1983 action plaintiff alleges that defendant Baumeister and another unidentified detective used excessive force when arresting plaintiff on May 13, 1996 which resulted in physical injury. Presently before the court is the motion of defendant Baumeister for summary judgment and the motion of defendant Lower Merion Police Department to dismiss.

Excessive force claims are analyzed under the Fourth Amendment "reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395 (1989). The issue is whether the officers actions were "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. At 397. See also Groman v. Township of Manalapan, 47 F.3d 628, 634 (3d Cir. 1995).

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact, and whether the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby, Inc., 477 U.S. 2442 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986).

Only facts that may affect the outcome of a case under applicable law are "material." All reasonable inferences from the record must be drawn in favor of the non-movant. Anderson, 477 U.S. at 256. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991).

From the evidence of record, the pertinent facts appear to be as follow.

On May 13, 1996, plaintiff was arrested on a warrant in an AM/PM Mini-Market located at a Sunoco gas station. As plaintiff was exiting the store, he was grabbed by two men whom he attempted to evade by pushing one into a rack and grabbing the other by his tie and swinging him around. Plaintiff states that these men never informed him they were police officers placing him under arrest. At some point, plaintiff observed a police radio on the floor of the store from which he realized the men were police officers. Defendants have submitted a video tape from a security camera in the store at the time of the arrest which shows that plaintiff was told he was being arrested by the officers.

During this confrontation, plaintiff was at some point kicked in his testicles and fell to the floor. When plaintiff

hit the floor, his bottom denture fell out. A police officer subsequently stepped on the denture, causing it to break. A third officer eventually joined the other two and assisted in arresting plaintiff.

Three days after his arrest, plaintiff noticed lumps in his testicles and notified the doctor at the Montgomery County Correctional Facility of his condition. Plaintiff believes these lumps were caused by the physical trauma he suffered during his arrest. Dr. Chiusano, a urologist who treated plaintiff, states that plaintiff's cysts were long standing and not the result of any recent physical trauma. Plaintiff states that he also suffered pain in his back, head, neck and one of his legs.

Plaintiff alleges that defendant Baumeister was one of the officers who arrested him on May 13, 1996. Officer Baumeister, however, avers that he did not participate in the arrest of plaintiff and was not even at work on May 13, 1996. Plaintiff acknowledged in his deposition that he named defendant Baumeister in the complaint because his name was on the probable cause affidavit used to secure an arrest warrant for plaintiff. Plaintiff admitted that by the time of the deposition he knew defendant Baumeister was not present at the arrest.

There is no competent evidence of record to show that defendant Baumeister was in any way involved in the arrest of plaintiff. He is entitled to summary judgment.

The defendant Department correctly contends that it is not a party subject to suit under § 1983. See Irvin v. Borough

of Darby, 937 F. Supp. 446, 450 (E.D. Pa. 1996); Johnson v. City of Erie, 834 F. Supp. 873, 878-79 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 825-26 (D.N.J. 1993).

Moreover, there is no evidence and indeed no allegation that any excessive force used in arresting plaintiff was undertaken pursuant to a municipal policy, practice, custom, regulation or enactment. See Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1987). There is no respondeat superior liability under § 1983. City of Canton v. Harris, 489 U.S. 378, 390 (1989); Simmons v. City of Philadelphia, 947 F.2d 1042, 1059-60 (3d Cir. 1991), cert. denied, 112 S.Ct. 1671 (1992).

ACCORDINGLY, this day of December, 1997, upon consideration of defendant Baumeister's Motion for Summary Judgment (Doc. #28) and defendant Lower Merion Police Department's Motion to Dismiss (Doc. #32), and in the absence of any responses thereto, **IT IS HEREBY ORDERED** that said Motions are **GRANTED** and **JUDGMENT is ENTERED** in the above case for defendant Detective Baumeister and against plaintiff and the above action as to defendant Lower Merion Township Police Department is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.